Supreme Court of the United States.

OCTOBER TERM, 1970.

No. 851.

DOMINIC STRAZZULLA,
Petitioner, Appellant,
v.
BUILDING INSPECTOR OF WELLESLEY ET AL.,
Respondents, Appellees.

ON APPEAL FROM THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

MOTION TO DISMISS OR AFFIRM.

The appellees hereby move that the appeal be dismissed or that the decision below be affirmed for the reasons hereinafter set forth.

Statement of Case.

This is an appeal from a decision of the Massachusetts Supreme Judicial Court ordering the entry in the Massachusetts Superior Court of a decree that certain of the appellees, members of the Board of Appeal of Wellesley, were within their authority in refusing the appellant a special permit to reword a roof sign located on his premises. The

opinion of the Massachusetts Supreme Judicial Court is reprinted in Appendix "A," pages 7-11 of the Jurisdictional Statement (herein cited as "Jur. St."). The Fourteenth Amendment of the United States Constitution, Massachusetts G.L. c. 40A, § 2, pertaining to zoning regulation, and Massachusetts G.L. c. 93, § 29, pertaining to sign regulation, are reprinted in Appendix "A" of the Jurisdictional Statement (Jur. St., pp. 13-15).

The controversy began when one of the appellees, the Building Inspector of the Town of Wellesley, refused the permit on the ground that the town's zoning by-law prohibited any alteration of a non-conforming sign. This sign had been erected before the adoption of the sign by-law. It was an oval sign, four feet by twelve feet, which had been erected over the roof of the business. It was an accessory sign defined in the by-law as any sign that advertises or indicates "the person occupying the premises." The by-law requires such a sign to be parallel to or perpendicular with a wall of the building. Roof signs are not permitted. Non-conforming signs legally erected prior to the adoption of the by-law may be continued to be maintained but shall not be reworded, redesigned or altered in any way unless brought into conformity.

The appellees, members of the Board of Appeal of the Town of Wellesley, after hearing, denied the application of the appellant for a special permit to reword the sign. The Massachusetts Supreme Judicial Court reversed a decree of the Massachusetts Superior Court annulling the decision of the appellees, members of the Board of Appeal.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (2). The appellant appears to contend that the Massachusetts zoning statute, G.L. c. 40A, § 2, the Massachusetts sign regulation statute, G.L. c. 93, § 29, and town by-laws limiting and regulating the use of property are invalid under

the Fourteenth Amendment of the Constitution of the United States.

Questions.

1. Was there a failure to bring to the attention of the state courts a federal question with fair precision?
2. Has the constitutionality of zoning ordinances been settled insofar as the federal Constitution is concerned?
3. Can the Massachusetts Legislature regulate and restrict signs on private property and delegate this power to municipalities as it deems appropriate?
4. Does the appellant's suggestion that the United States Supreme Court should set national guidelines as to nonconforming uses raise a question so unsubstantial as not to need further argument?
5. Does the decision of the Massachusetts Supreme Judicial Court that a town may reasonably regulate accessory signs rest on an adequate non-federal basis?

Argument.

1. Federal Questions have Not Been Properly Raised.

The appellant has not complied with Rule 15 1 (d) of the Rules of the United States Supreme Court as amended, effective July 1, 1970. He does not specify the state in the proceedings at which and the manner in which the federal questions sought to be reviewed were raised. At no point in the record does it appear that the assertion of a federal right was brought to the attention of the statute courts with fair precision.

Paragraph 6 of the Bill of Complaint (R. 2) alleges that the decision of the Board of Appeal deprives him of the use of his property without due process of law and amounts

to confiscation of his said property. This is not an averment so distinct and positive as to place it beyond question that the appellant intended to assert a federal right. *Oxley Stave Company* v. *Butler County*, 166 U.S. 648, 654-655; *New York ex rel.* v. *Kleinert*, 268 U.S. 646, 650; *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U.S. 430, 434-435. Further, an averment of a federal question in the pleadings has been held not to be a sufficient basis in itself for review by the United States Supreme Court. *St. Louis, Cape Girardeau & Fort Smith Railway Co.* v. *Missouri ex rel.*, 156 U.S. 478, 483.

Nothing appears in the opinion of the Massachusetts Supreme Judicial Court (Jur. St., pp. 7-11) to suggest that any issue under the federal Constitution was considered, passed upon or evaded. *Brown* v. *Massachusetts*, 144 U.S. 573, 579-580; *New York Central Railroad Company* v. *New York*, 186 U.S. 269, 273; *Bowe* v. *Scott*, 233 U.S. 658, 665. References to invalidity of the zoning by-law (R. 8; Jur. St., p. 8) and the refusal of the permit as "arbitrary, capricious and illegal" (R. 8; Jur. St., p. 8) raise questions of the construction of the state constitution and laws which rest with the state cou[illegible] "The state court's decision has foreclosed them adversely to appellant as a matter of state law." *Prince* v. *Massachusetts*, 321 U.S. 158, 163.

2. The Zoning Aspect of this Case Presents No Substantial Federal Question.

The Supreme Court of the United States wisely has been reluctant to review zoning cases. The state tribunals provide ample means for testing the validity of zoning ordinances and by-laws. It is a matter of common knowledge that some of these tribunals are overwhelmed by the flood of such cases. See, for example, the topic "Zoning" in the Decennial and General Digests.

This case presents no federal question of sufficient importance to warrant the attention of the Supreme Court of the United States. *Euclid* v. *Amber Realty Co.*, 272 U.S. 365, 395-397; *Burlington* v. *Dunn*, 318 Mass. 216, 220-224, cert. den. 326 U.S. 739; *Wisconsin ex rel. Saveland Park Holding Corporation* v. *Wieland, Building Inspector*, 269 Wis. 262, 69 N.W. 2d 217, cert. den. 350 U.S. 841. Rathkopf, The Law of Zoning and Planning (Third Edition) p. 4-1, see 13 Digest of United States Supreme Court Reports at topic "Zoning," pp. 979-980.

3. The Sign Aspect of this Case Presents No Substantial Federal Question.

This Court has emphasized its reluctance to interfere with the action of local legislative authority, primarily the judge of the public welfare, especially when its action is approved by the highest court of the state whose people are directly concerned. *Jacobson* v. *Massachusetts*, 197 U.S. 11, 30-31. This is particularly true of cases relating to the regulation of signs on private property. *Cusack Co.* v. *Chicago*, 242 U.S. 526, 530-531; *St. Louis Poster Advertising Company* v. *St. Louis*, 249 U.S. 269, 274; *General Outdoor Advertising Co., Inc.* v. *Department of Public Works*, 289 Mass. 149, 158-163, appeal dismissed, 296 U.S. 543, 297 U.S. 725.

4. The Appeal is Without Merit.

The thrust of the appellant's argument that the Court note probable jurisdiction seems to be that this case presents "an opportunity to set guidelines as to nonconforming uses" (Jur. St., p. 3). He also refers to a "most relevant case" wherein it was said that "The right to termination of particular nonconforming uses . . . will have to continue

to be fought out . . . in the light of the particular structure, use, location, cost, public effect . . ." &c. (Jur. St., p. 5). Assuming this to be so, it is not clear just how national guidelines can be set or what they would be.

This is a case of reasonable regulation of accessory signs, not their complete prohibition. The Massachusetts Supreme Judicial Court, basing its decision on non-federal grounds relating to the Massachusetts Constitution and statutes, correctly held that the purpose of the by-law "is to bring signs into some pattern of uniformity and to phase out nonconformity signs" (Jur. St., p. 11). It was open to the appellees, members of the Board of Appeal, to conclude that granting the permit sought by the appellant "would have been a subversion of that policy" (Jur. St., p. 11). The spirit and intent of zoning is to restrict and eventually eliminate non-conformity uses. Rathkopf, The Law of Zoning and Planning (Third Edition), chapter 62, p. 62-1 sq.

5. The Decision Below is Correct.

The Massachusetts Supreme Judicial Court held that the Town of Wellesley is authorized by state law "to regulate the location, size, color, material, and informational content of a sign such as this 'accessory sign' [and] . . . to specify the conditions necessary for or limitations on changes in a nonconforming sign" (Jur. St., p. 10). No federal right was invaded by the exercise of this power in a manner found, as a matter of fact, to have been reasonable (Jur. St., p. 11).

Conclusion.

The appeal should be summarily dismissed or the decision below should be affirmed.

Respectfully submitted,

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